UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

DARNELL PITTMAN, SR.,	:
	:CIVIL ACTION NO. 3:13-CV-1473
Petitioner,	:
	:(JUDGE CONABOY)
v.	:(Magistrate Judge Mehalchick)
	:
J.E. THOMAS, Warden,	:
	:
Respondent.	:
	:

MEMORANDUM

Pending before the Court is Magistrate Judge Karoline Mehalchik's Report and Recommendation (Doc. 25) concerning Petitioner Darnell Pittman's 28 U.S.C. § 2241 petition for writ of habeas corpus in which he claims his constitutional rights were violated during the course of prison disciplinary proceedings (Doc. 1). Magistrate Judge Mehalchick recommends the Petition be denied and dismissed with prejudice because Petitioner did not exhaust his administrative remedies and his claims are barred by procedural default. (Doc. 25 at 5.) Petitioner filed objections to the Report and Recommendation on December 16, 2014 (Doc. 28), after receiving an extension of time within which to do so (Doc. 27). For the reasons discussed below, we adopt the Report and Recommendation, deny the Petition, and dismiss this action.

I. Background

Petitioner does not object to the Background set out in the Report and Recommendation (Doc. 25 at 1-3). Therefore, we repeat

that recitation here.

> On January 11, 2013, Pittman received Incident Report No. 2395917, charging him with threatening bodily harm to his cellmate and to prison staff. (Doc. 10-2, at 32-34). On February 2, 2013, Pittman received a disciplinary hearing on these charges. (Doc. 10-2, at 40-49). The disciplinary hearing officer ("DHO") found that Pittman committed the charged offense and imposed disciplinary sanctions, including the disallowance of 27 days of good conduct time. (Doc. 10-2, at 43; Doc. 10-2, at 48). The DHO completed and signed his written report on March 4, 2013. (Doc. 10-2, at 49). The signature of another prison staff member indicates that it was delivered to Pittman that same day, on March 4, 2013. (Doc. 10-2, at 49).
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> Pittman, however, claims that the DHO report was not delivered to him on March 4, 2013. The record reflects his filing of several administrative grievances, complaining that he had not received the DHO report and requesting that it be provided to him so he could appeal it. (*E.g.*, Doc. 10-2, at 26-27). Pittman claims that he did not receive a copy of the DHO report until April 11, 2013. (*See* Doc. 1, at 22).
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> Pittman then submitted an appeal from the DHO report, which was received by the BOP regional office on April 22, 2013. (Doc. 1 at 28; *see also* Doc. 1, at 26; Doc. 1, at 27; Doc. 10-2, at 21). For reasons that are unclear,[1] the regional office logged it as an

[1] The document plainly states: "Appeal relevant to [Incident Report No.] 2395917, I appeal on the following grounds: (1) I did not commit an act of threatening another with bodily harm; (2) I was denied the right to call witnesses on my behalf; (3) I was denied the right to present documentary evidence ('camera footage'); (4) DHO was not impartial; and (5) I was denied a staff rep's assistance. 'RELIEF:' I request [the incident report] be expunged and good time credits restored - - along with privilleges [sic]." (Doc. 1, at 28).

appeal from one of the Pittman's facility-level grievances regarding the delay in receiving of the DHO report, marking it as Remedy ID No. 730676-R1. (*See* Doc. 1, at 28; Doc. 1, at 27; Doc. 10-2, at 21). This appeal was rejected on the ground that Pittman's facility-level grievance regarding the delay was still pending before the facility warden.[2] (Doc. 1, at 27; Doc. 10-2, at 21).

Pittman resubmitted his appeal, which was received by the regional office on May 8, 2013. (Doc. 1, at 28; *see also* Doc. 1, at 26; Doc. 10-2, at 21). On resubmission, the regional office logged the document correctly as an appeal from the DHO report, this time marking it as Remedy ID No. 733679-R1. (Doc. 1, at 28; Doc. 1, at 26; Doc. 10-2, at 21). On May 9, 2013, Pittman's appeal from the DHO report was rejected as untimely. (Doc. 1, at 26; Doc. 10-2, at 23). The rejection notice expressly acknowledged that the appeal had been first received on April 22, 2013, but found it to be untimely because it had been submitted approximately one month after the deadline for appeal had expired. (Doc. 1, at 26; Doc. 10-2, at 23).

Pittman did not appeal the regional office's decision to the BOP central office level, as is required for a federal inmate to exhaust administrative remedies. *See* 28 C.F.R. § 542.15(a).

On May 27, 2013, Pittman submitted the instant § 2241 petition to the Court for filing, alleging that he was denied the minimum procedural due process rights afforded to inmates in prison disciplinary proceedings. (Doc. 1). *See generally Wolff v. McDonnell, 418 U.S. 539 (1974).* On August

[2] That grievance, Remedy ID No. 730676-F1, complaining about the delay in delivery of the DHO report to Pittman, was filed at the facility level on April 17, 2013, and denied by the Warden on April 26, 2013. (Doc. 10-2, at 21).

> 2, 2013, the Respondent answered the petition, contending that Pittman failed to exhaust his available administrative remedies prior to filing his petition, that relief on these claims is barred due to his procedural default, and that Pittman's claims are meritless in any event. (Doc. 10). On August 29, 2013, the Court received and filed Pittman's brief in reply to the Respondent's answer. (Doc. 17).

(Doc. 25 at 1-3.)

II. Discussion

A. Standard of Review

When a magistrate judge makes a finding or ruling on a motion or issue, his determination should become that of the court unless objections are filed. *See Thomas v. Arn*, 474 U.S. 140, 150-53 (1985). When no objections are filed, the district court is required only to review the record for "clear error" prior to accepting a magistrate judge's recommendation. *See Cruz v. Chater*, 990 F. Supp. 375, 378 (M.D. Pa. 1998). When objections are filed, the district judge makes a *de novo* review of those portions of the report or specified proposed findings or recommendations to which objection is made. *See Cippolone v. Liggett Group, Inc.*, 822 F.2d 335, 340 (3d Cir. 1987), *cert. denied*, 484 U.S. 976 (1987). The *de novo* standard applies only to objections which are both timely and specific. *Goney v. Clark*, 749 F.2d 5, 6-7 (3d Cir. 1984). Although the review is *de novo*, the court may rely on the magistrate judge's recommendations to the extent it deems proper.

See United States v. Raddatz, 447 U.S. 667, 675-76 (1980); *Goney*, 749 F. 2d at 7. The court may accept, reject, or modify, in whole or in part, the findings made by the magistrate judge. 28 U.S.C. § 636(b)(1).

B. Petitioner's Objections

Petitioner specifically objects to the Magistrate Judge's statement that appeal to the BOP Central Office level is required for exhaustion of administrative remedies (Doc. 28 at 5), and her finding that Petitioner's failure to satisfy the procedural rules of the BOP's administrative remedy program constitutes a procedural default (*id.* at 9). We conclude these objections are without merit.

Magistrate Judge Mehalchick set out the appropriate general legal framework within which we consider the exhaustion issue.

> "Federal prisoners are ordinarily required to exhaust their administrative remedies before petitioning for a writ of habeas *corpus pursuant to § 2241." Moscato v. Fed. Bureau of Prisons*, 98 F.3d 757, 760 (3d Cir. 1996). Exhaustion is required because:
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> > (1) allowing the appropriate agency to develop a factual record and apply it expertise facilitates judicial review; (2) permitting agencies to grant the relief requested conserves judicial resources; and (3) providing agencies the opportunity to correct their own errors fosters administrative autonomy.

Moscato, 98 F.3d at 761-62.[3]

> Proper exhaustion requires that "a prisoner must complete the administrative review process in accordance with the applicable procedural rules, including deadlines, as a precondition to bringing suit in federal court." *Woodford v. Ngo*, 548 U.S. 81, 84 (2006).
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> Under the BOP's administrative remedy program, the first level appeal from a DHO decision is an appeal to the Regional Director. 28 C.F.R. § 542.14(d)(2); *see also* 28 C.F.R. § 541.8(I). An inmate may appeal a DHO report by submitting the appropriate form to the Regional Director within twenty calender days from the date when the DHO report was signed. *See* 28 C.F.R. § 542.15(a); *see also* 28 C.F.R. § 542.14(d)(2). An inmate who is not satisfied with the Regional Director's response may further appeal by submitting the appropriate form to the General Counsel at BOP's central office within thirty calendar days from the date when the Regional Director signed the response. 28 C.F.R. § 542.15(a). This appeal to the General Counsel is the final step in the administrative appeals process for disciplinary decisions. *See* 28 C.F.R. § 542.15(a) ("Appeal to the General Counsel is the final administrative appeal.").

(Doc. 25 at 3-4.)

At issue here is Petitioner's failure to comply with the final step of the exhaustion procedure: an appeal of the Regional Director's response to the BOP's General Counsel. 28 C.F.R. §§ 542.15, 542.16. Section 542.15(a) states in relevant part: "An

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[3] Citing *Bradshaw v. Carlson*, 682 F.2d 1050, 1052 (3d Cir. 1981) (*per curiam*); *Schlesinger v. Councilman*, 420 U.S. 738, 756-57 (1975).

inmate who is not satisfied with the Regional Director's response may submit an Appeal on the appropriate form . . . to the General Counsel within 30 calendar days of the date the Regional Director signed the response."

Petitioner does not dispute the fact that he did not appeal the Regional Director's decision finding his appeal untimely to the Office of the General Counsel. (*See* Doc. 25 at 4; Doc. 28 at 4.) Although Petitioner tries to spin his failure to file an appeal to the General Counsel as an acceptable choice in the circumstances of this case (Doc. 28 at 5-14), we reject this attempt.

With his first objection regarding the interpretation of 28 C.F.R. § 542.15(a), Petitioner argues that he was not required to file an appeal to the Office of the General Counsel because the pertinent statutory language is discretionary rather than mandatory. (Doc. 28 at 5.) He provides no relevant legal authority to support this proposition. As noted above, pursuant to 28 C.F.R. §§ 542.15(a) and 542.16, the final step of the administrative remedy process is to file an appeal with the Office of General Counsel. The use of the word "may" in § 542.15(a) provides discretion to the inmate as to whether he wishes to proceed with his appeal; the word does not change the requirements for administrative exhaustion.

Petitioner's second objection relating to Magistrate Judge Mehalchick's conclusion that Petitioner has procedurally defaulted

his claim is also without merit. Though not completely clear, he appears to argue that his claim is not procedurally defaulted (and his case should be decided on the merits) because he has demonstrated that exhaustion in this case would be futile. (Doc. 28 at 14.) He cites the following in support of his assertion that he has shown futility: "(1) [Exhaustion] is not a statutory requirement attachment to § 2241; (2) Such an appeal to the General Counsel under established BOP policy is not mandatory; (3) Such appeal to General Counsel was not for the purpose of reviewing the due process issue in Petitioner's appeal, but instead, to address 'untimeliness.'" (Doc. 28 at 14.) Having discounted the second basis, we now address the remaining two.

Petitioner is correct that exhaustion is not a statutory requirement under 28 U.S.C. § 2241 (Doc. 28 at 13-14). Although there is no statutory requirement, our Court of Appeals has consistently applied an exhaustion requirement to claims brought under § 2241. *Callwood v. Enos*, 230 F.3d 627, 634 (3d Cir. 2000) (citing *Schandelmeier v. Cunningham*, 819 F.2d 52, 53 (3d Cir. 1986); *Arias v. United States Parole Comm'n*, 648 F.2d 196, 199 (3d Cir. 1981)). The administrative exhaustion requirement generally imposed when a prisoner seeks relief under § 2241 "may be excused if an attempt to obtain relief would be futile or where the purposes of exhaustion would not be served." *Cerverizzo v. Yost*, 380 F. App'x 115, 116 (3d Cir. 2010) (citing *Woodall v. Fed. Bureau*

of Prisons, 432 F.3d 235, 239 n.2 (3d Cir. 2005); *Schandelmeier*, 819 F.2d at 53); *Gambino v. Morris*, 134 F.3d 156, 171 (3d Cir. 1998) (Roth, J., concurring)).

Here Petitioner presents no adequate basis to excuse the exhaustion requirement. His assertion that he has demonstrated the futility of exhaustion because the appeal addressed only untimeliness (Doc. 28 at 14) is without merit.

With respect to an inmate's failure to prosecute claims raised in a § 2241 petition through the process prescribed in prison regulations

> it is well settled that: "Courts in the Middle District of Pennsylvania have consistently held that exhaustion of administrative remedies is not rendered futile because a prisoner anticipates he will be unsuccessful in his administrative appeals . . . ." *Ross v. Martinez*, No. 09-1770, 2009 WL 4573686, 3 (M.D. Pa. Dec. 1, 2009). Quite the contrary, rigorously applying these exhaustion requirements, courts have consistently rejected habeas petitions challenging prison disciplinary decisions where the inmate-petitioners have failed to fully and properly exhaust their administrative remedies. *See, e.g., Johnson v. Williamson*, 350 F. App'x 786 (3d Cir. 2009); *Pinet v. Holt*, 316 F. App'x 169 (3d Cir. 2009); *Moscato v. Federal Bureau of Prisons*, 98 F.3d 757 (3d Cir. 1996).

Howell v. Castaneda, Civil No. 1:12-CV-2341, 2014 WL 5795604, at *3 (M.D. Pa. Nov. 6, 2014).

Within this legal framework, Petitioner has not shown futility. His anticipation that further appeal of the Regional

Director's decision to the General Counsel would not have resulted in a review of the substance of his claimed due process violations (Doc. 28 at 11-12) is inadequate to demonstrate futility.

Nor has Petitioner shown that exhaustion should be excused because the purposes of exhaustion would not be served by enforcing the regulatory requirements. Petitioner has not specifically addressed the reasons for exhaustion cited above. *See supra* p.5. Furthermore, we find that several considerations associated with the purposes of the exhaustion requirement are of particular note here: the importance of avoiding duplicative proceedings and that judicial review will be informed and narrowed, *Schlesinger v. Councilman*, 420 U.S. 738, 756-57 (1975); and the recognition that "frequent and deliberate flouting of administrative processes could weaken the effectiveness of an agency by encouraging people to ignore its procedures," *McKart v. United States*, 395 U.S. 185, 195 (1969). Strict adherence to the exhaustion of administrative remedies is of particular significance in Petitioner's case given his filing history: this is at least the sixth habeas case he has filed in the United States District Court for the Middle District of Pennsylvania since 2009[4]; and he has filed at least 209 administrative remedies (*see* Doc. 10 at 14). Petitioner is certainly well aware of the BOP's exhaustion requirements, he also

[4] Civil Action Numbers 3:09-CV-1170, 3:09-CV-2215, 3:10-CV-645, 3:10-CV-748, and 3:10-CV-788.

should be aware of the resources expended in addressing his numerous filings--the interests of administrative and judicial efficiency demand that he rigorously be held accountable for compliance with all relevant rules, regulations and statutory provisions.

Finally, we agree with Magistrate Judge Mehalchick that Petitioner's failure to satisfy the procedural rules of the BOP's administrative remedy program and his inability to complete the administrative process constitutes a procedural default. (Doc. 25 at 4 (citing 28 C.F.R. § 542.15(a); *Moscato*, 98 F.3d at 760).) Thus, review of his habeas claim is barred unless he can demonstrate cause and prejudice for his procedural default. *Moscato*, 98 F.3d at 760-61; *see also Beckford v. Martinez*, 408 F. App'x 518, 520 (3d Cir. 2010) (not precedential) (citing *Moscato*, 98 F.3d at 762). "By applying the cause and prejudice rule to habeas review of administrative proceedings, we insure that prisoners do not circumvent the appropriate agencies and needlessly swamp the courts with petitions for relief." 98 F.3d at 761. Petitioner's assertion that the DHO report was not delivered to him until April 11, 2013, (and not on March 4, 2013, as indicated by Respondent) (*see* Doc. 28 at 2 (citing Doc. 1 at 22; Doc. 10-2 at 49)) may provide "cause" for his original delayed filing of an appeal of the DHO report to the Regional Office. However, Petitioner presents no reason why he did not appeal the Regional

Director's response. Thus, Petitioner has not shown cause for his procedural default. Absent such a showing, review of the merits of Petitioner's claims is barred. *Beckford*, 408 F. App'x at 520 (citing *Moscato*, 98 F.3d at 760).

III. Conclusion

For the reasons discussed above, we adopt Magistrate Judge Mehalchick's Report and Recommendation (Doc. 25), deny the instant 28 U.S.C. § 2241 Petition (Doc. 1), and dismiss this action with prejudice. An appropriate Order is filed simultaneously with this Memorandum.

S/Richard P. Conaboy
RICHARD P. CONABOY
United States District Judge

DATED: December 19, 2014